

# ULPIAN'S *PRAECEPTA IURIS* AND THEIR ROLE IN SOUTH AFRICAN LAW PART 1: HISTORICAL CONTEXT

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## 1. Introduction

In the South African High Court case of *Bophuthatswana Broadcasting Corporation v Ramosa*<sup>1</sup> the court linked the foundational precepts of indigenous African, Chinese, Judaic-Christian and Roman law in the following remark:

The Constitution of this country has not swept away everything that came before. Confucius who was not a religious person but rather a teacher of social ethics said the following: ‘Do not do unto others what you would not want others to do unto you’ ... In this passage, Confucius clearly recognises that to be human is a communal enterprise. This statement is repeated somewhat differently in the Gospel according to St Matthew ... ‘[t]herefore all things whatsoever ye would that men should do to you, do ye even so to them: for this is the law and the prophets’. The concept contained in these passages quoted above forms part of *Ubuntu* which is incorporated in our Constitution. It was Justinian who said: ‘*Juris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere*’.

This *dictum* reflects the multilayered nature of the uncodified South African legal system, based as it is on the civilian (and English common-law) tradition, with elements of African customary law.<sup>2</sup>

1 [1997] JOL 283 (B) at 283. These sentiments are also shared by Ulrich Manthe “Beiträge zur Entwicklung des antiken Gerechtigkeitsbegriffes II: Stoische Würdichkeit und die iuris praecepta Ulpian” (1997) 114 *ZSS(R)* 1-26 at 25-26 who states that the “suum cuique tribuere” may also be found in Semitic and Christian as well as ancient Nordic, Eastern Asiatic, Marxist and Chinese legal theory.

2 See Part 2 of this article, Duard Kleyn & Gardiol van Niekerk “Ulpian’s *praecepta iuris* and their role in South African law Part 2: Modern-day South African practice” par 1.

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The theme of *praecepta iuris* and its roots in Greek philosophy lie close to the heart of our dear friend and esteemed colleague whom this publication is honouring, as is evidenced by our references to his articles in this contribution.

The limited scope of our article does not allow us to explore this theme in all its ramifications and we shall accordingly not address its development in the works of, for instance, St Augustine, Aquinas and Calvin.<sup>3</sup> However, since Laurens Winkel has a specific interest in African customary law and the influence of *ubuntu* in the development of the South African legal system, we shall investigate the possible intersection of the *praecepta iuris* and the underlying principles of African customary law in the second part of this article.

In this part of our article, we shall focus on Roman law, Greek philosophy and Roman-Dutch law.

## 2. Roman law

The prominence of justice and the *praecepta iuris* is evidenced by their placement in the *Corpus Iuris Civilis*. In both the Digest and the Institutes, these concepts are discussed in the first titles.

In D 1 1 10*pr* Ulpian defines justice as follows: “Justitia est constans et pertua voluntas ius suum cuique tribuendi” (Justice is the constant and perpetual desire to give to everyone that to which he is entitled.)<sup>4</sup> He then proceeds to link this definition with the *praecepta iuris* in D 1 1 10 1: “Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere”<sup>5</sup> (The precepts of the law are the following: to live honourably, to injure no one, to give everyone his due). Ulpian’s definition of *iustitia* is repeated in Inst 1 1*pr* and the description of *praecepta iuris* in Inst 1 1 3.

But what exactly are the *praecepta iuris*? Various Roman-law scholars have different views on the subject. Winkel describes them as “definitions of justice”;<sup>6</sup> Watson conceives them as “basic principles”;<sup>7</sup> Thomas translates them as the “precepts of law”;<sup>8</sup> Spruit

3 See in this regard DH van Zyl *Justice and Equity in Cicero. A Critical Evaluation in Contextual Perspective* (Pretoria, 1991) at 213-222. See, also, Manthe (n 1) at 23.

4 SP Scott *The Civil Law* vol 2 (Cincinnati, 1932) available at <http://droitromain.upmf-grenoble.fr/> (accessed 3 Nov 2013).

5 Malte Diesselhorst “Die Gerechtigkeitsdefinition Ulpian’s in D,1,10*pr*. und die Praecepta iuris nach D. 1,1,10,1 sowie ihre rezeption bei Leibniz und Kant” in Okko Beherens, Malte Diesselhorst & Wulf Eckart Voss (eds) *Römisches Recht in der europäischen Tradition. Symposium aus Anlaß des 75. Geburtstages von Franz Wieacker* (Ebelsbach, 1985) 185-211 at 185: “Die Gerechtigkeitsdefinition Ulpian’s und die *praecepta iuris* stehen in einem engen literarischen und wohl auch sachlichen Zusammenhang.”

6 Laurens Winkel “The role of general principles in Roman law” (1996) 2(1) *Fundamina* 103-120 at 104.

7 See Alan Watson’s English translation of *The Digest of Justinian* vol 1 (Philadelphia Penn, 1985) D 1 1 10 1.

8 JAC Thomas *The Institutes of Justinian. Text Translation and Commentary* (Cape Town, 1975) Inst 1 1 3.

describes them as “grondbeginselen van het recht”;<sup>9</sup> and Sandars refers to them as “the ‘maxims of law’”.<sup>10</sup>

What is apparent from these descriptions is that the *praecepta iuris* are not rules of positive law or legal rules deduced from law in action, but rather ethical principles or morals.<sup>11</sup> This brings to mind the difference between *praecepta iuris* and *regulae iuris* (rules of law) – the latter also being prominently placed in the last title of the Digest. In the opening fragment of D 50 17, Paul encapsulates *regulae iuris* as brief statements derived from the law in practice.<sup>12</sup> One may then argue that *praecepta iuris* formed the intuitive basis of legal reasoning and informed the casuistic approach of the Roman jurists; while the *regulae* were rules derived from existing law. It follows naturally that the *praecepta iuris* are not justiciable and that to give them content one must revert to competing concepts of justice.<sup>13</sup>

Interestingly, Ulpian merely mentions the three *praecepta iuris* but does not explain their content. This prompted later scholars to ponder their meaning. We briefly focus on the glossators, with whom the reception of Roman law started at the end of the eleventh century, and on Kant to whom several scholars<sup>14</sup> refer in this regard.

The Accursian Gloss cursorily discusses the meaning of all three precepts. One example used to illustrate *honeste vivere* is that of the wife who lives chastely within matrimony, honouring her vows in accordance with the *mores* of the day.<sup>15</sup> The glossators’ interpretation of *alterum non laedere* boils down to the principle that you should treat others as you want them to treat you: people should not harm one another.<sup>16</sup> The glossators link *suum cuique tribuere* to Ulpian’s definition of *iustitia* in D 1 1 10*pr.* They state that not only should people not harm one another; they also have a duty to assist others.<sup>17</sup> This is in accordance with the gloss “*iuris praecepta*” *ad* D 1 1 10 1, which states that one *praeceptum* punishes, another prohibits and another allows.

9 JE Spruit *et al* *Corpus Iuris Civilis. Tekst en Vertaling* vol 2 (‘s-Gravenhage, 1994) D 1 1 10 1; *cf* AC Oltmans *De Instituten van Justinianus. Vertaling, Tabellen en Register* (Haarlem, 1967) Inst 1 1 3, who refers to it as “grondregels van het recht” bringing to mind the distinction between *praecepta* and *regulae iuris*.

10 TC Sandars *The Institutes of Justinian* (London, 1934) Inst 1 1 3.

11 *Cf* Winkel (n 6) at 104; JB Moyle *Imperatoris Justiniani institutionum* (Oxford, 1955) at 98-99; HR Hahlo & Ellison Kahn *The South African Legal System and its Background* (Cape Town, 1968) at 9; HG Hanbury “The realisation of Ulpian’s *iuris praecepta*” (1958) *Acta Juridica* 200-202 at 202.

12 See Peter Stein’s “The Digest title, *De diversis regulis iuris antiqui*, and the general principles of law” in his *The Character and Influence of the Roman Civil Law Historical Essays* (London, 1988) 53-72; Derek van der Merwe “*Regulae iuris* and the axiomatization of the law in the sixteenth and early seventeenth centuries” (1987) 3 *TSAR* 286-302; Laurens Winkel “A note on *regulae iuris* in Roman law and on Dworkin’s distinction between rules and principles” in John W Cairns & Olivia F Robinson (eds) *Critical Studies in Ancient Law, Comparative Law and Legal History* (Oxford, 2001) 413-418.

13 See Diesselhorst (n 5) at 199.

14 See, eg, *idem* at 208-211; Van Zyl (n 3) at 229-231.

15 Gloss “*honeste*” *ad* D 1 1 10 1.

16 Gloss “*alterum non laedere*” *ad* D 1 1 10 1.

17 Gloss “*suum*” *ad* D 1 1 10 1.

In the late eighteenth century, Kant<sup>18</sup> commented on the three *praecepta*, arguing that *honeste vivere* means that one must be law-abiding and also implies that one must maintain one's dignity in personal interactions with others. As regards *alterum non laedere*, he notes that one should not harm others, even if this means avoiding all social contact. For Kant the crux of *suum cuique tribuere* is that one should "create a situation in which everyone can secure against others that which is his own".<sup>19</sup>

Some scholars nevertheless argue that the classical Roman jurists were not significantly influenced by the *praecepta iuris* and that their approach to Roman law is often in conflict with the spirit of the *praecepta iuris*.<sup>20</sup> These scholars generally base their views on those instances where Roman law is not in accord with the *praecepta iuris*, and a number of *regulae iuris* that are in conflict with the *praecepta*.<sup>21</sup> It has been suggested that this incongruity may be attributed to the difference between the approaches of the Proculiani and the Sabiniani. The former school followed a strictly institutional legal approach that excluded the ethical views of the Sabiniani, which were based on Stoicism.<sup>22</sup>

However, one has to bear in mind that Roman law is often in accord with the *praecepta* and that the *praecepta* and *regulae iuris* are often in accord with each other.<sup>23</sup>

We shall now give a cursory overview of the origins of the *praecepta iuris* in Greek philosophy.

### 3. The origins of *praecepta iuris* in Greek philosophy

It is usually accepted that Ulpian's definition of justice and his *praecepta iuris* are rooted in Greek natural-law philosophy, especially as proclaimed in Stoic doctrine.<sup>24</sup> The fully developed idea of natural law appeared for the first time in Aristotle's *Rhetoric*, linking the concept of *physis* (nature) and *nomos* (law). Greek philosophical schools

18 I Kant *Die Metaphysic der Sitten; Erster Theil Metaphysische Anfangsgründe der Rechtslehre* vol 6 *Gesammelte Schriften* (Berlin, 1914) at 236-237; Manthe (n 1) at 23; cf. also, Diesselhorst (n 5) at 208-210.

19 Van Zyl (n 3) at 230.

20 See, eg, Diesselhorst (n 5) at 195 ff. It appears that Ernst Levy "Natural law in Roman thought" in Wolfgang Kunkel & Max Kaser (eds) *Ernst Levy Gesammelte Schriften* vol 1 (Köln, 1963) 1-19 at 16-19 in fact denies any influence of these *praecepta* on the "imposing system of the Roman law" (at 17); for a contrary view, see Hanbury (n 11) *passim*.

21 Compare, eg, the inconsistency of "honeste vivere" and the *regula iuris* in D 50 17 144: "Everything which is permissible is not always honourable"; or "alterum non laedere" and D 50 17 55: "No one is considered to commit a fraud who does what he has a right to do".

22 Okko Beherens "Institutionelles und prinzipielles Denken im römischen Privatrecht" (1978) 95 *ZSS(R)* 187-231 at 216 ff; see, also, Diesselhorst (n 5) at 186 n 8, 191 n 23, 200.

23 See C Wollschläger "Das stoische Bereicherungsverbot in der römischen Rechtswissenschaft" in Beherens, Diesselhorst & Voss (n 5) 41-88 at 49-50, who links the *regula* against unjust enrichment in D 50 17 206 with *alterum non laedere*.

24 See, eg, Laurens Winkel "Die stoische oikeiosis-Lehre und Ulpians Definition der Gerechtigkeit" (1988) 150 *ZSS(R)* 669-679 at 669-672; Levy (n 20) at 5, 16; Fritz Schulz *History of Roman Legal Science* (Oxford, 1967) at 72; Ulrich Manthe "Beiträge zur Entwicklung des antiken Gerechtigkeitsbegriffes I: Die Mathematisierung durch Pythagoras und Aristoteles" (1996) 113 *ZSS(R)* 1-32 at 1; Manthe (n 1) *passim*; Van Zyl (n 3) at 44, 198.

such as the Sophists, Cynics and Hedonists interpreted the concept of *physis* in different ways.<sup>25</sup> Then, with the Stoics, came a dramatic departure from previous ideas about the relationship between law and nature. Dignity featured strongly in their philosophy, as did an all-encompassing notion of kinship and equal rights for all. Importantly, they featured man as a rational creature, departing from the introspective paradigm of “man-slave” and “Hellenes-barbarians”.<sup>26</sup>

Aristotle and Pythagoras distinguished between distributive and corrective justice. Their philosophy found its way into Ulpian's *praecepta* via the Stoics and is evidenced in his *suum cuique tribuere* and *alterum non laedere*.<sup>27</sup>

The Greeks did not have a highly developed legal science. They focused on philosophy and rhetoric, but their philosophical thought and dialectics influenced the Roman development of private law as a legal science.<sup>28</sup> The Romans, on the other hand, were masters of the law. The Roman jurists' approach to law was casuistic, focusing on the outcome of cases.<sup>29</sup> In fact, Douzinas<sup>30</sup> points out that for the Roman jurists *ius* did not mean a collection of legal rules but the just outcome of a case – a just distribution. Justice did not feature strongly in the language of the Roman jurists, but it made an impressive reappearance in Justinian's Digest and Institutes.<sup>31</sup>

There are several views on the extent of the influence of Greek philosophy on Roman legal science. Scholars have variously labelled it, for example, as debatable,<sup>32</sup> negligible,<sup>33</sup> probable,<sup>34</sup> limited,<sup>35</sup> and profound.<sup>36</sup> However, one cannot deny the Stoic influence on the works of Cicero, who in this sense became the bridge between Greek philosophy

25 Aldo Schiavone *The Invention of Law in the West* (London, 2012) at 292-293; Costas Douzinas *The End of Human Rights Critical Legal Thought at the Turn of the Century* (Oxford, 2000) at 26-30. Douzinas (at 30) points out that according to the Sophists *physis* was “what endures through change and remains constant behind diversity” while the Cynics and Hedonists who succeeded them “associated nature with the simplicity of animality and the indulgence of private pleasures”.

26 See Douzinas (n 25) at 31; *cf.*, also, Christopher Roederer & Darrel Moellendorf *Jurisprudence* (Lansdowne, 2004) at 34-35.

27 Manthe (n 24) at 30-31.

28 JA Ankum “Griekse invloeden op het Romeinse recht en op de Romeinse rechtswetenschap” (1982) 15 *Lampas* 331-340 at 334; Fritz Pringsheim “Griechischer Einfluss auf das römische Recht” (1960) 63 *BIDR* 1-17 at 1-5, 15; Randall Lesaffer *European Legal History A Cultural and Political Perspective* (tr Jan Ariens, Cambridge, 2009) at 76-78; Schulz (n 24) at 55, 69-71.

29 Douzinas (n 25) at 41-42; Fritz Schulz *Principles of Roman Law* (Oxford, 1936) at 51-52.

30 (n 25) at 48; for other meanings of *ius*, see Moyle (n 11) at 98.

31 Schiavone (n 25) at 294-295, 419-420.

32 Van Zyl (n 3) at 74.

33 See John R Kroger “The philosophical foundations of Roman law: Aristotle, the Stoics, and Roman theories of natural law” in Richard O Brooks (ed) *Cicero and Modern Law* (Brighton, 2009) 229-268 at 268 (reference is to the pagination of the 2009 ed).

34 Winkel (n 24) at 679; see, also, Laurens Winkel “Cujas, Fabrot, and once again Greek philosophy in Roman law: The cases of *libertas* and *error iuris* compared” in Harry Dondorp *et al* (eds) *Ius Romanum- Ius Commune- Ius Hodiernum Studies in Honour of Eljo JH Schrage on the Occasion of his 65<sup>th</sup> Birthday* (Amsterdam, 2010) 429-437; Pringsheim (n 28) at 13.

35 Lesaffer (n 28) at 18-19.

36 Kroger (n 33) at 268.

and Roman legal science.<sup>37</sup> He introduced the concept of natural law into Roman legal thought, but his perception of natural law was “simplified and transformed”.<sup>38</sup> Cicero saw himself not as a true Stoic, but as belonging to the so-called “New Academy”, which would classify him as an eclectic Stoic, because he did not follow Stoicism slavishly.<sup>39</sup>

It is common cause that Ulpian’s *praecepta* are of Greek origin and that he relied on Cicero who had, as indicated, been strongly influenced by Stoicism.<sup>40</sup> One should, however, not negate the roots of the *praecepta* that preceded the Stoics.<sup>41</sup> The three propositions are a recurring theme in the works of Cicero.<sup>42</sup>

Manthe<sup>43</sup> observes that the Stoics did not treat the three *praecepta* as an entity as Ulpian did, and that Ulpian added *honeste vivere* to the other two *praecepta*. There is speculation about the origins of this trichotomy.<sup>44</sup> According to Manthe,<sup>45</sup> it may be traced back to a Semitic influence that prevailed in the Italian colony of Tyrus in which Ulpian grew up. Ulpian was well versed in the literature of the region and it is feasible that the doctrines of the prophet Micah may have influenced him in this respect.<sup>46</sup>

37 Van Zyl (n 3) at 181, 208.

38 Douzinas (n 25) at 49.

39 Kroger (n 33) at 258 esp n 141; Douzinas (n 25) at 49. Van Zyl (n 3) at 196 shows that Stoicism did not remain stagnant, and that Cicero was influenced by the “Middle Stoics” of the second century BC.

40 See, eg, Kroger (n 33) at 261-263; Levy (n 20) at 16-17; Diesselhorst (n 5) at 195-201; Winkel (n 24) at 672; Van Zyl (n 3) at 208. See the texts below in which Cicero refers to the Stoics and Greek philosophy.

41 Eg, Aristotle and Demosthenes: see Manthe (n 1) at 12-13; cf, also, Marc A Loth & Laurens Winkel “Reasonableness in a divided society” (2009) 2 *De Jure* 302-315 at 314; Van Zyl (n 3) at 191 points out that Plato adopted the precept of *suum cuique tribuere* from Simonides; see, also, DH van Zyl “Cicero and Roman law” (1991) 108 *SALJ* 496-502 at 496.

42 See, eg, as regards *honeste vivere*: *De finibus* 3 8 29: “ex quo intellegitur idem illud, solum bonum esse, quod honestum sit, idque esse beate vivere: honeste, id est cum virtute, vivere”; *De finibus* 2 11 34: “his omnibus, quos dixi, consequentes fines sunt bonorum, Aristippo simplex voluptas, Stoicis consentire naturae, quod esse volunt e virtute, id est honeste, vivere, quod ita interpretantur: vivere cum intelligentia rerum earum, quae natura evenirent, eligentem ea, quae essent secundum naturam, reicientemque contraria”. For *cuique tribuere* see: *De inventione* 2 53 160: “iustitia est habitus animi communi utilitate conservata suam cuique tribuens dignitatem”; *De finibus* 5 23 65: “Quae animi affectio suum cuique tribuens atque hanc, quam dico”; *De legibus* 1 6 19: “eamque rem illi Graeco putant nomine a suum cuique tribuendo appellatam”. And for *alterum non laedere* see: *De officiis*: 1 7 20: “sed iustitiae primum munus est, ut ne cui quis noceat, nisi lacessitus iniuria, deinde ut communibus pro communibus utatur, privatis ut suis” and 1 10 31: “fundamenta iustitiae, primum ut ne cui noceatur, deinde ut communi utilitati serviatur”; *De finibus* 3 21 71: “Ius autem, quod ita dici appellarique possit, id esse natura, alienumque esse a sapiente non modo iniuriam cui facere, verum etiam nocere.”

43 Manthe (n 1) at 12.

44 There is some suggestion of the three propositions in the works of Demosthenes; and Manthe (n 1) at 13-14 notes that one cannot exclude the possibility (although he thinks it improbable) that Cicero’s Stoic interpretation of Demosthenes may have caused him to treat the three *praecepta* as a coherent whole.

45 (n 1) at 16-21.

46 Cf, also, Henry H Brown “Ulpian’s definition of jurisprudence” (1921) 33 *Juridical Review* 128-133 at 130-131. Brown compares Ulpian’s *praecepta iuris* with the triad in Micah 6 v 8, which sets a higher standard of conduct that includes generosity, charity and mercy, thus positing the standards of conduct in a communal rather than individualistic context. By contrast, Tony Honoré *Ulpian* (Oxford, 1982) at 15 maintains that neither Semitic nor Greek influences can be proven in Ulpian’s writings.

#### 4. Roman-Dutch law

Since Roman-Dutch law forms the basis of the South African common law, we briefly explore the *praecepta iuris* in the works of a selection of the institutional writers.<sup>47</sup>

Simon van Groenewegen van der Made, in his work on abrogated laws,<sup>48</sup> quotes the seventeenth-century English poet John Barclay's satirical reference to the changing nature of human mores: "[A] law formerly considered most sacred namely to live honestly, not to hurt another, to give unto each his due ... has now definitely been abolished ... to my bitter disappointment."

In his *Inleiding tot de hollandsche rechtsgeleerdheid*<sup>49</sup> Hugo de Groot distinguishes between natural (*aangeboren*) and positive (*gegeven*) law (*wet*).<sup>50</sup> Natural law is intuitive to humankind and allows a person to differentiate between that which is honourable and that which is dishonourable.<sup>51</sup> Because humans are reasonable beings they are drawn to a "rational communion"<sup>52</sup> (*redelyke gemeenschap*) with others, which is founded on the principle "treat others as you want them to treat you".<sup>53</sup> In this way Grotius links natural law to Ulpian's definition of justice.<sup>54</sup>

Grotius expands on the concept of *redelyke gemeenschap* in his *De iure belli ac pacis*,<sup>55</sup> in which he refers to it as *appetitus societatis*. According to Grotius it is the *appetitus societatis*, a concept of Stoic origin, which distinguishes human beings from other living beings.<sup>56</sup> Winkel traces the roots of this concept to Cicero<sup>57</sup> and more especially to Seneca.<sup>58</sup> He further links the *appetitus societatis* to the social contract theory, which is based on brotherly love as expounded in the writings of Locke.<sup>59</sup> He points out that the concept of *appetitus societatis* contributed to modern perceptions of

47 In this regard, see Kleyn & Van Niekerk Part 2 (n 2) par 1.

48 *Tractatus de legibus abrogatis et inusitatis in hollandia vicinisque regionibus* (Leiden, 1649) ad Inst 1 1 3; see, also, B Beinart's translation *A Treatise on the Laws Abrogated and No Longer in Use in Holland and Neighbouring Regions* vol 1 (Johannesburg, 1974) ad Inst 1 1 3.

49 With notes by Simon van Groenewegen van der Made and Willem Schorer (Middelburg, 1767).

50 At 1 2 4.

51 At 1 2 5.

52 At 1 2 6: see the translation by RW Lee *The Jurisprudence of Holland* vol 1 (Oxford, 1926).

53 At 1 2 6: "[D]e grondvesten zyn: anderen te doen, dat men wilde dat hemzelve geschiede". In n 10 of this text reference is made to Inst 1 1 3.

54 Cf. further, Winkel's description of the *praecepta* as "definitions of justice" (see above the text at n 6) and his article on the Stoic "oikeiosis" doctrine in n 24.

55 (Amsterdam, 1712).

56 *Idem* Prolegomena par 6.

57 *De finibus* 4 18: "apetensque convictum hominum ac societatem": see Laurens Winkel "Les origines antiques de l'*appetitus societatis* de Grotius" (2000) 68 *Tijdschrift voor rechtsgeschiedenis* 393-403 at 400.

58 *Epistula ad Lucilium* 9 17: "Quomodo solitudinis odium est et appetitio societatis ...": Winkel (n 57) at 400.

59 As opposed to Hobbes' negative version of the social contract, as having developed as a defence against eternal strife: Winkel (n 57) at 402; cf. also, Laurence Dickey "Doux-commerce and humanitarian values" in Hans W Blom & Laurens C Winkel (eds) *Grotius and the Stoa* (Assen, 2004) 271-317 at 279-281.

social solidarity, which influenced political thinking even before the French Revolution and places *appetitus societatis* in today's human-rights discourse.<sup>60</sup>

Grotius describes three different meanings of the term "ius" in book 1 of *De iure belli ac pacis*.<sup>61</sup> He equates the third meaning of *ius* with *lex*, which compels one to moral virtue (*obligans ad id quod rectum est*).<sup>62</sup> Gronovius, in a footnote to this text, links *ad rectum* to *honeste vivere* as part of the *praecepta iuris*.<sup>63</sup>

Arnoldus Vinnius introduces his discussion of the *praecepta iuris* by emphasising that they are not legal rules but dictates of natural law, which are embedded and sealed in our psychological experiences.<sup>64</sup> He notes the Stoic origins<sup>65</sup> of the *praecepta* and links them to the virtues of prudence (*prudencia*), self-control (*temperantia*), courage (*fortitudine*) and justice (*justitia*). *Honeste vivere* relates to self-control, *neminem laedere* to courage, and *suum cuique tribuere* to justice.

With reference to D 1 1 10 *pr* and Inst 1 1 *pr* Simon van Leeuwen merely repeats Ulpian's definition of justice and then goes on to explain that the maxims of law are the three *praecepta* as found in D 1 1 10 1 and Inst 1 1 3.<sup>66</sup>

Ulrich Huber in his *Heedensdaegse rechtsgeleertheyf*<sup>67</sup> follows Grotius in distinguishing between natural and positive law ("aangeborene en gegevene Wet"<sup>68</sup>). Like Vinnius, he explicitly states that the basic principles (*gront-regels*) of natural law are that people should live honourably, harm no one, give everyone his due and treat others as they themselves wish to be treated.<sup>69</sup>

In his *Commentarius ad pandectas*,<sup>70</sup> Johannes Voet refers to Grotius's third definition of *ius* as mentioned above, as well as Cicero's definition and that of Marcianus, who quotes Chrysippus. He importantly divides *ius* into public and private law, both being derived from the precepts of nature (*utrumque collectum ex praeceptis naturalibus*): everyone should live honourably, not injure others, and give everyone his due. Gane<sup>71</sup> remarks that these precepts are not rules of law, but "the promptings or warnings towards justice of jurisprudence or civil wisdom or the art of the good and the fair".

60 Winkel (n 57) at 402-403; see, also, Hans Blom & Laurens Winkel "Introduction" in Blom & Winkel (n 59) 3-20 at 7 ff.

61 At 1 1 3-9.

62 At 1 1 9.

63 See Gronovius's note in 1 1 9 n 67.

64 *In quattuor libros institutionum imperialium commentarius* (Leiden, 1726) at 1 1 3; cf, also, Dionysius van der Keessel *Dictata ad Justiniani institutionum libros quattuor* (edited and transcribed by B Beinat, BL Hijmans & P van Warmelo) vol 1 (Amsterdam, 1965) ad Inst 1.1.3.

65 Referring to Cicero and Seneca.

66 *Censura forensis* (Amsterdam, 1685) 1 1 1; see, also, his *Het Rooms Hollands-regt* (Amsterdam, 1686) 1 1 3-4.

67 (Amsterdam, 1742).

68 At 1 1 2 3.

69 At 1 1 2 8.

70 Vol 1 (Geneve, 1769) at 1 1 11.

71 Percival Gane *The Selective Voet being the Commentary on the Pandects by Johannes Voet* vol 1 (Durban, 1955) at 16 n (c).

## 5. Conclusion

Ulpian's *praecepta iuris*, which are closely linked to his definition of justice, are placed very prominently in the first titles of Justinian's Digest and Institutes. It is commonly acknowledged that they originate in the various Greek theories on natural law, especially those of the Stoics who influenced Ulpian through the works of Cicero. Unlike the *regulae iuris*, the *praecepta iuris* are not rules of positive law, but rather ethical principles or morals that have different meanings and a different content in disparate cultures and societies. The role of the *praecepta* in the body of Roman law is disputed, but they and their Greek origins in natural law found their way into Roman-Dutch law, especially the work of Grotius. They helped shape his particular perception of natural law and the notion of *appetitus societatis*. They also found their way into South African law, as will be shown in Part 2 of this contribution.

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## Abstract

This article provides an historical overview of Ulpian's *praecepta iuris* and focuses on their roots in Greek philosophy and their role in Roman law. It alludes briefly to the meaning of the *praecepta* in later legal literature such as the *Glossa ordinaria* and the works of Kant. It reflects on the role of the *praecepta* in Roman-Dutch law, the common law of South Africa. In Part 2 of this contribution, we explore the influence of the *praecepta iuris* in present-day South African law, including African customary law.